FILED
AUG 12 1983
ALEXANDER L. STEVAS
CLERK

No. 82-2075

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

THE STATE OF ARIZONA,
Petitioner,

vs.

RICHARD F. YOUNG,
Respondent.

SUPPLEMENTAL AND REPLY BRIEF OF PETITIONER

THOMAS E. COLLINS
MARICOPA COUNTY ATTORNEY
BY HERBERT WILLIAMS
Deputy County Attorney
101 West Jefferson Street
(602) 262-1131
Counsel for Petitioner,
State of Arizona.

Of Counsel:

Michael D. Jones
Special Deputy Maricopa County Attorney
101 West Jefferson Street
Phoenix, Arizona 85003
(602) 262-1131
Counsel for Petitioner,
State of Arizona.

QUESTIONS OF PRESENTED

I

HAS ARIZONA INTERPRETED THE SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONTATION AND CROSS-EXAMINATION DIFFERENTLY THAN OTHER STATE COURTS OF LAST RESORT AND FEDERAL COURTS OF APPEALS?

II

HAS ARIZONA INTERPRETED THE FOURTH AMENDMENT DIFFERENTLY THAN THIS COURT?

PARTIES TO THE PROCEEDING

Petitioner:
THE STATE OF ARIZONA
Respondent:
RICHARD F. YOUNG*

*Respondent is an individual

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO PROCEEDING	ii
ARGUMENTS	
I. ARIZONA HAS INTERPRETED THE SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONTATION AND CROSS-EXAMINATION DIFFERENTLY THAN OTHER STATE COURTS OF LAST RESORT AND FEDERAL COURTS OF APPEALS	2
II. ARIZONA HAS INTERPRETED THE FOURTH AMENDMENT DIFFERENTLY THAN THIS COURT	6
CONCLUSION	8

INDEX OF AUTHORITIES

Page

CASES

Chapman v. State,
638 P.2d 1280 (Wyo. 1982) 5
Commonwealth v. Nazarovitch,
436 A.2d 170 (Pa. 1981) 6
Kline v. Ford Motor Company,
523 F.2d 1067 (9th Cir. 1975) 4
People v. Hughes, slip opinion,
New York Court of Appeals No. 232
(July 5, 1983) 6
People v. Shirley, 31 Cal.3d 18,
181 Cal.Rptr. 226, 641 P.2d 775
(1982) 5
People v. Smrekar, 68 Ill.App.3d 379,
385 N.E.2d 848 (1979) 5
People v. Tait,
297 N.W.2d 853 (Mich.App. 1980) . 5
Snead v. Florida,
415 So.2d 887 (Fla.App. 1982) 5
State v. Armstrong,
329 N.W.2d 386 (Wisc. 1983) 5
State v. Beachum,
643 P.2d 246 (N.M. App. 1981) 5
State V. Brom,
494 P.2d 434 (Ore.App. 1972) 5
State v. Commeau,
438 A.2d 454 (Maine 1981) 5
State v. Glebock,
616 S.W.2d 897 (Tenn.App. 1981) . 5
State v. Greer,
609 S.W.2d 425 (Mo.App. 1980) ... 5
State v. Hurd,
86 N.J. 525, 432 A.2d 86 (1981) ... 5
State v. Long,
649 P.2d 845 (Wash.App. 1982) 5

INDEX OF AUTHORITIES

Page

CASES (continued)

State v. McQueen,
295 N.C. 96, 244 S.E.2d 414 (1978) . 5
State v. Mack,
292 N.W.2d 764 (Minn. 1980) 5-6
State v. Palmer,
313 N.W.2d 648 (Neb. 1981) 6
State v. Peoples,
299 S.E.2d 311 (N.C.App. 1983) ... 5
State ex rel. Collins v. Superior Court,
132 Ariz. 180, 644
P.2d 1266 2
Strong v. Indiana,
435 N.E.2d 969 (1982) 5
United States v. Place,
_____ U.S. _____, 33 Cr.L.Rptr.
3186 (June 20, 1983) 6
United States v. Miller,
411 F.2d 825 (2nd Cir. 1968) 3
United States v. Adams,
581 F.2d 193 (9th Cir. 1978) 4
United States v. Awkard,
597 F.2d 667 (9th Cir. 1979) 4
Wyller v. Fairchild-Hiller Corp.,
503 F.2d 506 (9th Cir. 1974) 4

CONSTITUTION

Constitution of the United States:

Fourth Amendment 6, 7

Sixth Amendment 2, 3, 4, 5, 6

Fourteenth Amendment 2, 3, 4, 5, 6

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 82-2075

THE STATE OF ARIZONA,

Petitioner,

v.

RICHARD F. YOUNG,

Respondent.

SUPPLEMENTAL AND REPLY BRIEF OF PETITIONER

Now Comes the State of Arizona, by Herbert E. Williams, Deputy Maricopa County Attorney, and Michael D. Jones, Special Deputy Maricopa County Attorney, and submits its Supplemental and Reply Brief.

ARGUMENT

I

ARIZONA HAS INTERPRETED THE SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONTATION AND CROSS-EXAMINATION DIFFERENTLY THAN OTHER STATE COURTS OF LAST RESORT AND FEDERAL COURTS OF APPEALS.

The Arizona courts have adopted a per se rule of inadmissability of hypnosis-developed evidence based upon a perceived threat to effective cross-examination of a witness as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States. The Arizona rule of per se inadmissibility is in conflict with a growing number of decisions from other state's highest courts, as well as federal courts of appeal.

A. *Arizona has incorrectly invoked the Sixth and Fourteenth Amendments to the United States Constitution as proscribing hypnosis-developed testimony.*

In his brief at pages 8-9, Respondent Young challenges Petitioner's characterization of the Arizona rule involving the Sixth and Fourteenth Amendment to the United State's Constitution. The Arizona Supreme Court has stated quite emphatically in its supplemental opinion in the case of *State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 206, 644 P.2d 1266, 1292:

> The effective use of cross-examination is impaired in violation of the rights guaranteed by the Sixth and Fourteenth Amendments of the Constitution of the United States.

There is absolutely no authority for the bizarre proposition that hypnosis deprives a defendant of the effective use of cross-examination any more than any

other investigative or interview technique employed by law enforcement. Thus, the invocation by the Arizona Supreme Court of the Sixth and Fourteenth Amendments to the United States Constitution clearly invokes 28 U.S.C.A. 1257(3), involving a federal question.

It should also be noted that Respondent Young mischaracterizes the nature of the Arizona court's rule concerning the inadmissibility of hypnosis-developed evidence. See Respondent Young's brief, at 10. The Arizona rule is one of per se inadmissibility of hypnosis-developed testimony. This is clear from the following language from the Arizona Supreme Court in the supplemental opinion in *State ex rel. Collins v. Superior Court, supra*, 132 Ariz. at 208-9, 644 P.2d at 1294-95:

> We reaffirm our previous holdings that hypnotically induced recall testimony is inadmissible. *This is a rule of per se inadmissibility* based upon what we conceive to be sound public policy in the administration of the judicial system and in the oversight of the constitutional rights of litigants (emphasis added).

B. *There is a conflict between the Arizona courts' interpretation of the Sixth and Fourteenth Amendments to the United States Constitution as they effect hypnosis and federal courts of appeal decisions.*

Arizona's per se rule of inadmissibility of hypnosis-developed testimony is in conflict with the decisions of two federal courts of appeal who have considered the federal question. In *United States v. Miller*, 411 F.2d 825 (2nd Cir. 1968), the government's principle witness, Joseph Caron, was placed under hypnosis by the prosecutor in an attempt to revive his memory concerning an identification at a different trial. Because of the important nature of the identification, the Second

Circuit Court of Appeals found that there was a duty on the government to disclose the fact that Caron had been hypnotized. Although the defendant's motion for a new trial was granted because of the non-disclosure of the hypnosis, the court made a point that Caron was still a competent witness, that nothing in the court's decision should be taken to imply that the hypnosis would disqualify any future testimony from Caron. (411 F.2d at 832.)

Similarly the Ninth Circuit Court of Appeals has held in two recent criminal cases that hypnosis does not affect the admissibility of a witness' testimony, but rather is a matter of credibility. *United State v. Awkard*, 597 F.2d 667 (9th Cir. 1979), *United States v. Adams*, 581 F.2d 193 (9th Cir. 1978). In *United States v. Awkard, supra*, hypnosis was used successfully to assist a prison inmate in recalling the details surrounding the stabbing of another inmate. In this unusual case the hypnosis subject was ordered by the defendant to stab his best friend. Fearing for his own life, the subject complied, stabbing the victim superficially. Other inmates proceeded to stab the victim 13 times. Because of his fear, the hypnosis subject was unable to recall all of the inmates involved in the stabbing. Through hypnosis, he was able to overcome his personal trauma and relax, enabling him to remember details of the incident.

The Ninth Circuit Court of Appeals has extended its rule of per se admissibility concerning hypnosis-developed testimony to civil cases as well. *Kline v. Ford Motor Company*, 523 F.2d 1067 (9th Cir. 1975); *Wyller v. Fairchild-Hiller Corp.*, 503 F.2d 506 (9th Cir. 1974).

The per se rules of admissibility enunciated by the Second and Ninth Circuit Court of Appeals are in direct conflict with the per se rule of inadmissibility followed by the Arizona courts.

C. *Arizona's per se rule of inadmissibility of hypnosis-developed testimony based upon the Sixth and Fourteenth Amendments to the United States Constitution is in direct conflict with decisions of other state's highest courts.*

Arizona's per se rule of inadmissibility of hypnosis-developed testimony is in direct conflict with the decisions of other state's highest courts. The following state supreme courts have refused to adopt per se rules of inadmissibility, and permit a previously hypnotized witness to testify: *People v. Smrekar*, 68 Ill.App.3d 379, 385 N.E.2d 848 (1979); *State v. Commeau*, 438 A.2d 454 (Maine 1981); *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981) (the New Jersey Supreme Court adopts six procedural requirements as a condition precedent for the admission of hypnosis-developed testimony); *State v. McQueen*, 295 N.C. 96, 244 S.E. 2d 414 (1978); *State v. Armstrong*, 329 N.W.2d 386 (Wisc. 1983); *Chapman v. State*, 638 P.2d 1280 (Wyo. 1982). The following state appellate courts have approved the admissibility of hypnosis-developed testimony: *Snead v. Florida*, 415 So.2d 887 (Fla.App. 1982); *State v. Greer*, 609 S.W.2d 425 (Mo.App. 1980); *State v. Beachum*, 643 P.2d 246 (N.M. App. 1981) (the New Mexico Court of Appeals adopts the six procedural requirements stated in the New Jersey case of *State v. Hurd, supra); State v. Peoples*, 299 S.E.2d 311 (N.C.App. 1983); *State v. Brom*, 494 P.2d 434 (Ore.App. 1972); *State v. Glebock*, 616 S.W.2d 897 (Tenn.App. 1981); *State v. Long*, 649 P.2d 845 (Wash.App. 1982).

Several state courts have agreed with Arizona in promulgating a per se rule of inadmissibility of hypnosis-developed testimony: *People v. Shirley*, 31 Cal.3d 18, 181 Cal.Rptr. 226, 641 P.2d 775 (1982); *Strong v. Indiana*, 435 N.E.2d 969 (1982); *People v. Tait*, 297 N.W.2d 853 (Mich.App. 1980); *State v.*

Mack, 292 N.W.2d 764 (Minn. 1980); *State v. Palmer*, 313 N.W.2d 648 (Neb. 1981); *People v. Hughes*, slip opinion, New York Court of Appeals No. 232 (July 5, 1983); *Commonwealth v. Nazarovitch*, 436 A.2d 170 (Pa. 1981).

Petitioner submits that there exists a direct conflict between the per se rule of inadmissibility adopted by the Arizona courts, two federal courts of appeals, and many other state appellate courts, as reflected above. Petitioner would respectfully request that this Court accept its Petition for Writ of Certiorari so as to correctly interpret the effect of hypnosis upon an individual's Sixth and Fourteenth Amendment rights to confront and cross-examine witness.

II

ARIZONA HAS INTERPRETED THE FOURTH AMENDMENT DIFFERENTLY THAN THIS COURT.

The Arizona Court of Appeals opinion finding that Richard F. Young possessed a reasonable expectation of privacy in the premises searched is in direct conflict with language from a recent decision of this Court: *United States v. Place*, _____ U.S. _____, 33 Cr.L.Rptr. 3186 (June 20, 1983). In that case this Court stated, at 33 Cr.L.Rptr. 3187:

> For example, "objects such as weapons or contraband found in a *public place* may be seized by the police without a warrant," *Payton v. New York*, 445 U.S. 573, 587 (1980), because, under these circumstances, the risk of the item's disappearance or use for its intended purpose before a warrant may be obtained outweighs the interest in possession. See also *G. M. Leasing Corp. v. United States*, 429 U.S. 338, 354 (1975). (emphasis added).

In the instant matter, the alleged murder weapon, a revolver, was removed from a ceiling tile in a public area of the Leprechaun Lounge. This searched area was a place of public domain in which Young could not have reasonably expected the degree of privacy he asserted before the Arizona court.

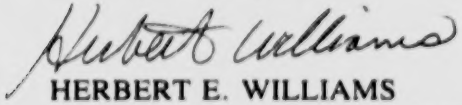
Petitioner would respectfully request that this court grant its petition for a Writ of Certiorari for the reason that the Arizona court suppressed evidence seized without a warrant in an area of public domain, contrary to this Court's interpretation of the Fourth Amendment to the United States Constitution.

CONCLUSION

It is respectfully submitted that for the reasons outlined above and in Petitioner's Petition for Writ of Certiorari, plenary review should be granted.

Respectfully submitted,

THOMAS E. COLLINS
Maricopa County Attorney



HERBERT E. WILLIAMS
Deputy Maricopa County Attorney

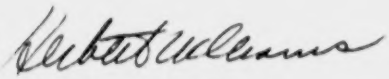
MICHAEL D. JONES
Special Deputy
Maricopa County Attorney

Dated: July 20, 1983

CERTIFICATION

Herbert E. Williams, being duly admitted to practice before the Supreme Court of the United States of America, herewith certifies that three copies of the Supplemental and Reply Brief have been delivered to Thomas A. Thinnes, Attorney for Richard F. Young, at 1005 North 2nd Street, Phoenix, Arizona.

Additionally, as a courtesy, I herewith certify that service of three copies of this petition has been made upon the United States of America, by depositing the same in the United States mailbox, with first class postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530.



Herbert E. Williams